

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION (APPELLATE DIVISION)

HOLDEN AT COURT 14, APO ABUJA

BEFORE THEIR LORDSHIP:

HON. JUSTICE U.P. KEKEMEKE (PRESIDING JUDGE)

HON. JUSTICE M.A. NASIR (HON. JUDGE)

APPEAL NO.: CRA/43/2015

DATE.:28/10/15

COURT CLERK:

BETWEEN:

EMMANUEL ORJIHAPPELLANT.

AND

COMMISSIONER OF POLICERESPONDENT.

JUDGMENT

By a Notice of Appeal dated and filed on the 20th June, 2015, the Accused/Appellant being dissatisfied with the decision of the Chief Magistrate Court, Kuje delivered on Monday 15th June, 2015 in **Commissioner of Police Vs. Emmanuel Orji** doth Appeal to this Court on the following grounds:

1. That the trial Chief Magistrate erred in law and wrongly exercised his Judicial Powers when he overruled the 'No case; submission not

withstanding that the prosecution gravely failed to prove all the essential ingredients in the offences charged.

2. That the trial Chief Magistrate erred in law and wrongly exercised his Judicial Powers when he did not consider all the evidence before him in determining a No case submission whereas the evidence of the prosecution was highly discredited and could not sustain the charge.
3. The trial Chief Magistrate erred in law when he wrongly admitted the contradictory extra Judicial Statement of the Appellant after a trial within trial and relied on same as evidence of PW2 in determining a No case submission in utter disregard to the Court of Appeal and Supreme Court decisions.
4. The trial Chief Magistrate erred in law when he overruled the No case submission whereas the prosecution could not and did not call vital witness.
5. The trial Chief Magistrate erred in law leading to a miscarriage of Justice when he went on window shopping, speculations, assumptions and conclusions for the prosecution descending into the arena by making a case for the prosecution and complementing the Prosecution's inadequacies and dearth of evidence.

The Appellant's brief of argument is dated and filed on the 4th day of September, 2015. Learned Counsel to the Appellant raised four issues for determination:

1. Whether having regards to the facts and circumstance of this case, the Respondent made out a prima facie case against the Appellant to enable the Trial Chief Magistrate overrule the No case submission made on behalf of the Appellant.

2. Whether having regards to the law and decision, the Trial Chief Magistrate was right when he neglected and refused to consider the evidence of all the prosecution witnesses under cross examination whereas the evidence of the prosecution was highly discredited and could not sustain the charge.
3. Whether the Chief Magistrate was right when he wrongly admitted and relied on the contradictory extra Judicial Statement of the Appellant as forming part of PW2's evidence.
4. Whether the Trial Chief Magistrate was right when he descended into the arena interfering, fabricating and imputing vital evidence for the prosecution particularly for PW1 without recourse to evidence before the Court thereby causing a miscarriage of Justice.

Arguing issues 1 & 2 together, Learned Counsel to the Appellant submits that a prima facie case connotes the existence of evidence sufficient enough to support the allegation made and would be regarded as having been made in the absence of further evidence in rebuttal of same.

Learned Counsel submits that the prosecution failed to establish the ingredients/elements of the offences for which the Defendant/Appellant was charged. Referring to the First Information Report at page 1 of the Records of Appeal, Learned Counsel argues that No Statement of Account from FCMB was tendered by the prosecution to prove the purported transfer of N86 Million or any amount whatsoever from FCMB to Fortis Bank. That the said amount was not mentioned anywhere else yet it was the foundation of the charge. That the Complainant in the FIR was **Enap Builders Ltd** but none of the Directors of the Company was called to tender any signature.

That the charge of forgery was not proved. No evidence that the Accused forged the document in question.

Learned Counsel refers to the evidence of PW1 and canvassed that no direct evidence of forgery was given by him. That PW1 was not presented with the cheque or any document which was forged. No one knows the purported signature on the document that was forged. No handwriting expert/analyst was called. That the trial Magistrate ignored the evidence of PW1, PW2 and PW3 under cross examination which he was bound by law to look at and consider. That the prosecution gravely failed to establish the essential ingredients in the offense of forgery and if any, it has been discredited by virtue of cross examination.

In respect to the charge of Criminal Breach of Trust, Learned Counsel contends that contract as stated by PW1 is not a property within the meaning of Section 311/312 of Penal Code Law. That there was no where PW1` stated he entrusted the Appellant with any property whatsoever the contract or anything else that the Chief Magistrate totally ignored and neglected the evidence of PW1 under cross examination. That there was no entrustment for prosecution to secure conviction for the offence of criminal breach of trust, it must prove entrustment and dishonest misappropriation which are necessary ingredients of the offence. That the offence of cheating under Section 325 cannot be committed against an unnatural person such as a body corporate. That the vital ingredients in the charge of criminal misappropriation or conversion are not established by the evidence of the prosecution. It is not proved that the subject matter of the conversion is moveable property. Learned Counsel also argued issue 4

in the brief of argument. The Respondent Counsel also adopted his Respondent's brief of argument dated 16/10/15 and filed on 19/10/15. He submitted a lone issue for determination which is whether the Learned Trial Magistrate misdirected himself in fact and in law to have dismissed the No case submission:

That the administration of Criminal Justice Act 2015 which has caught up with the Interlocutory Appeal does not make provision for a submission of No case to answer by Counsel.

However, for a Defendant to succeed on a No case submission, he must establish the following requirements:

1. That prosecution has failed to prove the ingredients or some of the ingredients of the offence.
2. That evidence adduced by the prosecution has been thoroughly discredited through cross examination.
3. That the prosecution evidence has been manifestly unreliable that no reasonable tribunal could convict on it.

Learned Counsel to the Respondent submits that the evidence adduced by the prosecution has not in any way been discredited by the defence under cross examination. That a submission of no case is not upheld lightly. That no matter how slight the evidence linking the Accused with the commission of the offence charged. The case ought to proceed in Court for the Accused to explain his own side of the story. That in a no case submission, the issue is not whether the Respondent has proved the charges against the defendant/Appellant but whether a Prima Facie case has been made out so as to make it necessary for the Accused/Appellant to be called to open his

Defence. That the evidence adduced by the prosecution at the lower Court has not in any way been discredited. Learned Counsel to the Respondent urged the Court to dismiss the Appeal and uphold the Ruling of the Learned Trial Magistrate.

We have read the records of proceedings and the brief of argument adopted by Counsel to both parties. Thus, Interlocutory Appeal is borne out of a No case submission made by the Defendant/Appellant in the lower Court which submission was overruled. The Defendant/Appellant is dissatisfied, in that the prosecution did not make out a prima facie case against the appellant to warrant the lower Court calling him to enter this defence. The question that is germane to this Appeal is? what will the Trial Magistrate consider when faced with a no case submission.

In **EMEKA EKWUNUGO VS. FRN (2008) 7 SCNJ 236**, the Supreme Court held:

“The main question raised in this appeal brings to the fore what a Trial Judge should look for in a case where a No case submission is made at the close of the case for the prosecution. The position of the law is that a submission that there is no case to answer by an Accused person means that there is no evidence on which even if the Court believes it, it could convict. In other words certain essential elements of the offence for which the Accused stands charged were not proved by the

prosecution. No evidence was led to prove such essential elements”.

The question whether or not the Court believes the evidence led does not arise at that stage of the proceedings. The credibility of the witness also does not arise at that stage. This is because the trial of the case at that stage has not yet been concluded. This is therefore the reason why the Court should not concern itself with the credibility of witness or the weight to be attached to the evidence, even if they are accomplices.

A submission of no case to answer could therefore only be properly made and upheld when:

- (a) There has been no evidence to prove an essential element in the alleged offence and or.
- (b) When the evidence adduced by the prosecution has been discredited that no reasonable tribunal could safely convict on it.

It follows therefore that what has to be considered at the stage of a no case submission is not whether the evidence against the accused is sufficient to justify conviction but whether the prosecution has made out a prima facie case requiring at least some explanations from the Accused person.

See ***AJIBOYE VS. STATE (1995) 8 NWLR (PT. 414).***

R VS. COKER 20 NLR 62.

R VS. EKANEM (1950) 13 WACA 108.

BELLO VS. STATE (1976) NMLR 1.

In this particular instance, the Appellant's grounds is that the prosecution did not make out a prima facie case against him and that the Trial

Magistrate neglected and refused to consider the evidence of all the prosecution witnesses elicited during cross examination which were rightly discredited. The FIR before the lower Court is Criminal Breach of Trust, Criminal Misappropriation and forgery punishable under Section 312, 309 and 364 of the Penal Code Law. That you Emmanuel Orji (Appellant) between the Month of April, 2011 to February, 2012 at Moses Close, Majekodunmi Street Utako, Abuja defrauded Enap Nig Ltd at No: 87 Ubiaja Street, Garki II, Abuja of the Sum of N86,000,000:00 which sum was illegally and fraudulently transferred to First City Monument Bank Plc account into Fortis Micro Finance Bank from which account the said sum was converted to your own use after forging the signature of one of the Directors of Enab Builders Mr.Gamel E. Onwuneme and thereby committed the aforesaid offences. See page 1 of the Records of Appeal.

In Exhibit B1 – B1B pages 2 – 4 of the Records of Appeal are the Statements of the Accused. In page 4 of the Records the Witness stated:

“In addition to my earlier statement made yesterday, I confirm that I singlehandedly signed the two signatures for the withdrawals and there was no Bank connivance as the officers did not suspect.....”

Learned Counsel to the Appellant canvassed in his brief that the Trial Magistrate wrongly relied on the above statement as forming part of PW2's evidence.

We have gone through the records of proceedings. At page 79 – 80 the Court delivered a considered Ruling dated 28/11/13 after a trial within trial, admitting the statement of the Accused/Appellant in evidence (part of which statement has been reproduced inter alia Exhibits 1 (a) (b) & (c). There is no record showing that the Accused/Appellant appealed against that Ruling. In the circumstance, it was right in our view, for the Trial Magistrate to rely on the said document while considering the No case submission made by the Appellant. At page 1 is the First Information Report. The evidence of PW1 is on page 62 of the Records of Appeal, while the cross examination is on pages 64, 65 and 66. The PW2's evidence is on page 69, 70, 71 and 81 of the Records of Appeal while the cross examination is on page 84. The 3rd prosecution witness's evidence is on pages 86 and 87 while the cross examination is on page 90. The Ruling on the No case submission is on pages 92 – 96.

From the totality of evidence of the prosecution witnesses and evidence elicited during cross examination, vis avis the Ruling of the Trial Court, can the trial magistrate be said not to have considered the evidence elicited during cross examination? We do not think so. There is nothing on record to show that evidence of prosecution witnesses have been so discredited to the extent that no reasonable tribunal should believe same. In pages 93 and 95, the Learned Trial Magistrate acknowledged that PW1 and PW2 were cross examined. It is our view that the trial Chief Magistrate considered the totality of the evidence put before him as he remarked in page 96 of the records:

“From the totality of the evidence adduced, there is sufficient evidence to justify the continuation of the case against the Accused in this Court.... This Court is satisfied that from the totality of evidence by the prosecution, a prima facie case has been made out against the Accused”.

In ***TONGO VS. COP (2007) 12 NWLR (PT. 1049) 523 SC***, the Supreme Court held:

“A prima facie case arise when evidence against an accused is such that, if uncontradicted and if believed, will be sufficient to prove the case against the Accused. The apex Court continued

“In a criminal trial, at the close of the case for the prosecution, a submission of no prima facie case to answer made on behalf of an accused person postulates one of two things or both of them:

(a) Firstly, that there has been throughout the trial no legally admissible evidence at all against the Accused person, on behalf of whom the submission of no prima facie case has been made, linking him in any way with the commission of the offence with which he has been charged, which would necessitate his being called upon for his defence.

(b) Secondly, whatsoever evidence there was which might have linked the Accused person with the offence has been so discredited that no reasonable Court can be called upon to act on it as establishing criminal guilt in the accused concerned.”

We have considered the evidence adduced at the Trial Chief Magistrate Court, there is evidence linking the Accused to the charge. Aside the evidence of PW1 and PW2, his statements made on 17/05/12 and 18/05/12 which are Exhibits B1A and B1B link the Accused with the offences charged coupled with the cheques allegedly signed by the Defendant on behalf of the PW1.

In ***AITUMA VS STATE (2006) 10 NWLR (PT. 989) PAGE 452***, the Court of Appeal held:

“when a submission of no case is made on behalf of the Accused person, the Trial Court is not thereby called upon at this stage to express any opinion on the evidence before it. The Court is only called upon to take note and to rule accordingly that there is before the Court no legally admissible evidence linking the Accused person with the commission of the offence with which he was charged. If such is not the case, the submission is bound to fail”.

In our view, and we so hold that the Trial Chief Magistrate was right when he held that there is sufficient evidence to justify the continuation of the case ... or that a prima facie case has been made out against the accused requiring him to enter his Defence.

Aside the above, by the Extant law i.e Administration of Criminal Justice Act, 2015, there is no provision for a no case submission. Counsel should

hasten not to abort criminal trial half way by rushing to the Appeal Court on a no case submission. The law now is that, Counsel should avail themselves of a full trial and then appeal if necessary. It would save time and money.

In the circumstance of this case and for the totality of reason given, the Appeal fails and it is dismissed. The Ruling of the Trial Chief Magistrate Court on the 'No case submission' delivered on 15/06/15 is hereby affirmed.

Signed.

**HON. JUSTICE U.P. KEKEMEKE
(PRESIDING JUDGE)
28/10/15**

Signed.

**HON. JUSTICE M.A. NASIR
(HON. JUDGE)
28/10/15**